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Prison Law - Before and After *Wilson v. Seiter*: Cases Challenging the Conditions of Confinement in the Ninth Circuit

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PRISON LAW

BEFORE AND AFTER *WILSON V. SEITER*: CASES CHALLENGING THE CONDITIONS OF CONFINEMENT IN THE NINTH CIRCUIT

I. INTRODUCTION

The Supreme Court has long acknowledged that prisoners do not leave their civil rights at the prison or jail door.¹ The cruel and unusual punishment clause of the eighth amendment² has consistently provided an avenue for prisoners to protest inadequate medical care, lack of safety measures, and inhumane conditions of confinement within the prisons. To determine if a challenged condition of confinement violated the eighth amendment prior to *Wilson v. Seiter*,³ the courts applied an objective standard. The objective standard required the courts to consider whether a reasonable person would find that the condition was so serious a deprivation of basic human needs that it offended the evolving standards of decency.⁴ Recently the Supreme Court, in *Wilson v. Seiter*,⁵ added a subjective element to the standard. In addition to finding the challenged condition is objectively severe, an inquiry into the prison officials' state of mind must also be performed to determine if they were deliberately indifferent to the condition that resulted in the harm to the prisoner.⁶ The deliberate indifference standard was used previously only in those cases where an individual prisoner

1. See *Cooper v. Pate*, 378 U.S. 546 (1964). See *infra* note 45 for a discussion of the case.

2. U.S. CONST. art. VIII. See *infra* note 8 for the text of the eighth amendment.

3. 111 S. Ct. 2321 (1991). See *infra* note 63 and accompanying text for a discussion of the case.

4. The standard is most comprehensively laid out in *Rhodes v. Chapman*, 452 U.S. 337 (1981). To determine whether the condition was objectively severe the courts were required to analyze scientific and historical evidence concerning the challenged deprivation, as well as laws enacted outside of the prison context. *Id.* at 346-347. See *infra* note 58 and accompanying text for a discussion of the case.

5. 111 S. Ct. 2321 (1991).

6. *Id.* at 2322-2328.

was challenging the inadequate attention to his or her particular medical needs or personal safety.⁷

This article will examine the development of the standard for eighth amendment review used in cases challenging the conditions of confinement before and after *Wilson*. It will begin with an examination of the interpretations of the cruel and unusual punishment clause in the Supreme Court. This article will then analyze the objective standard for eighth amendment review as applied by the Ninth Circuit Court of Appeals in prison condition cases. After an analysis of the subjective standard for eighth amendment review established in *Wilson v. Seiter*, the article will survey how the Ninth Circuit and other circuits have applied this new standard.

II. EVOLUTION OF THE STANDARD FOR EIGHTH AMENDMENT REVIEW

A. THE EIGHTH AMENDMENT AND THE MEANING OF CRUEL AND UNUSUAL PUNISHMENT

The eighth amendment of the United States Constitution protects an individual from the imposition of cruel and unusual punishment.⁸ Since the adoption of the Bill of Rights, the Supreme Court has struggled to determine the precise meaning of this amendment as intended by the framers of the constitution.⁹ The Court's interpretations have generally fallen within two categories: (1) a traditional interpretation based on

7. See, e.g., *Franklin v. Oregon*, 662 F.2d 1337 (9th Cir. 1981) (See *infra* note 75 and accompanying text for a discussion of the case) and *Berg v. Kincheloe*, 794 F.2d 457 (9th Cir. 1986) (See *infra* note 67 for a discussion of the case).

8. U.S. CONST., art. VII., The Eighth Amendment reads as follows:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The eighth amendment has been applied to the states through the due process clause of the fourteenth amendment, U.S. CONST. art. XIV. See *Robinson v. California*, 370 U.S. 660 (1962).

9. See generally Note, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783 (1969) (Hereinafter *Beccaria*). This article discusses the historical foundation of the eighth amendment and how the Supreme Court has interpreted this amendment, specifically in the Court's decision in *Weems v. United States* and its focus on the excessiveness rather than the barbarity of punishment. *Id.* See also Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839 (1969). See *infra* note 13 for a discussion of the article.

the Court's understanding of the English Bill of Rights and its prohibition on tortuous and barbarous punishment,¹⁰ and (2) a more expansive interpretation based on these English law prohibitions as well as concepts of excessiveness.¹¹

1. *The Traditional Interpretation*

The Supreme Court most frequently attributes the origin of the cruel and unusual punishment clause to the English Bill of Rights of 1688.¹² The Court has often contemplated that this clause in the eighth amendment was intended to prohibit methods of punishment similar to those barred by the English Bill of Rights,¹³ namely tortuous and barbaric methods of punishments.¹⁴ The traditional standard for reviewing the constitutionality of a punishment has often focused, therefore, on the methods of punishment and whether these methods approach the level of cruelty or unusualness as those prohibited under English Law.¹⁵

In *In re Kemmler*,¹⁶ the Supreme Court considered the issue of whether death by electrocution violated the eighth

10. See *Becarria*, 24 BUFF. L. REV. at 786-792.

11. See *Id.* at 793-808.

12. *Id.* at 788.

It is the English Bill of Rights of 1689 which is said most often to be the origin of the phrase "cruel and unusual punishment" and the wording of the subsequent American Bill of rights, thus, has been seen as a mere verbatim copy with naturally a coextensive meaning.

Id.

13. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 845-846 (1969). Granucci discusses the Framers' misinterpretation of the cruel and unusual punishment clause of the English Bill of Rights. He explains that they mistakenly interpreted the English Bill of Rights as barring barbarous methods of punishment in reaction to the treason trials of the "Bloody Assize" and thereby limiting the eighth amendment's coverage to include only a ban on tortuous or barbarous methods of punishment such as quartering, thumb screws, etc. Granucci explains that the origin of the clause stems from the minority dissent of the House of Lords in the *Titus Oates* case. The minority focused on the excessiveness of the punishment imposed on Oates as cruel and unusual punishment. *Id.* at 856-859.

14. *Becarria*, 24 BUFF. L. REV. at 788. Those punishments considered to be inherently cruel include crucifixion, quartering, disembowelment, burning at the stake, breaking on the wheel and subjection to the rack. *Id.*

15. See *In re Kemmler*, 136 U.S. 436 (1890). See *infra* note 16 and accompanying text for a discussion of the case.

16. 136 U.S. 436 (1890). *Kemmler* was found guilty and sentenced to death by electrocution for the murder of his wife. The New York Supreme Court upheld the conviction and sentencing. *Kemmler* petitioned the Supreme Court on the ground that electricity was an unconstitutional mode of imposing death. The Supreme Court held that death by electricity was a humane method of execution. *Id.* at 447.

amendment.¹⁷ The Court observed that only those punishments that are equally as cruel as those meant to be proscribed by the English Bill of Rights are prohibited by the constitution.¹⁸ The Court continued "that punishments are cruel if they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution."¹⁹ The Supreme Court concluded that since electrocution is a quick and painless method of putting someone to death, it does not violate the eighth amendment.²⁰

The Supreme Court used a similar interpretation in *Louisiana ex rel Francis v. Resweber*.²¹ The Court denied petitioner's contention that a second electrocution, after the initial one had failed to kill him, would constitute cruel and unusual punishment.²² The Court found that this was not within the parameters of cruel and unusual punishment since "the cruelty against which the constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."²³ Furthermore, since there was no intention on the part of the state or the executioner to impose unnecessary pain on petitioner,²⁴ this previously determined humane mode of punishment²⁵ would not be rendered cruel and unusual.²⁶

2. *The Expansive Interpretation*

The Supreme Court has also interpreted the cruel and unusual punishment clause to prohibit more than just the imposition of barbarous or tortuous methods punishment. In

17. *Id.* The court also considered whether death by electrocution violated the cruel and unusual clause of the New York constitution, which, like most states, is identical to the United States constitutional ban on cruel and unusual punishment. *Id.* at 440.

18. *Id.* at 446.

19. *Kemmler*, 136 U.S. at 446.

20. *Id.* at 443.

21. 329 U.S. 452 (1946).

22. *Id.* at 463-464.

23. *Id.* at 464.

24. *Id.* The court noted that the failure of the execution was an accident. *Id.*

25. *See In re Kemmler*, 136 U.S. 436 (1910).

26. *See Resweber*, 329 U.S. at 463-464. The court indicated that "prohibition against the wanton infliction of pain," is directly attributable to the English Bill of Rights. *Id.* at 463. The Court appears to be indicating that absent a showing that the method of execution is cruel or unusual or that the state or executioner intended to subject the petitioner to the unnecessary pain of a repeat electrocution no constitutional violation can be found. *Id.* This observation is what the Supreme Court in *Wilson* relied upon in part to require a state of mind inquiry in cases challenging the constitutionality of conditions of confinement. *Wilson v. Seiter*, 111 S. Ct. 2322-2323 (1991).

Weems v. United States,²⁷ the Supreme Court noted that the framers had surely intended to prohibit more than just tortuous and barbarous punishments.²⁸ The Court interpreted the clause as "progressive, not fastened to the obsolete, but (able to) acquire meaning as public opinion becomes enlightened by a humane justice."²⁹ The Court, relying on the dissent from *O'Neil v. Vermont*,³⁰ held that the imposition of a 15-year sentence of hard labor was excessive in proportion to the offense committed, and was therefore in violation of the eighth amendment.³¹ The Supreme Court in *Weems* expanded the interpretation of the cruel and unusual punishment clause to prohibit more than punishments which include physical pain.³² If a punishment is so severe or excessive that it is disproportionate to the crime, the eighth amendment is violated.³³

In *Trop v. Dulles*³⁴ the issue before the court was whether denationalization,³⁵ the penalty for wartime desertion, was cruel and unusual punishment under the eighth amendment.³⁶ The Supreme Court agreed with *Weems*³⁷ that the meaning of

27. 217 U.S. 349 (1910). The issue before the court was whether the imposition of a sentence of 15 years hard labor for the crime of falsifying government documents was cruel and unusual punishment within the meaning of the Eighth amendment. The Court held that the punishment was cruel and unusual due to its excessive and unusual character. *Id.* at 377.

28. *Id.* at 372.

29. *Id.* at 377.

30. 144 U.S. 323 (1892). A man was convicted of 307 violations of the Vermont liquor laws and sentenced to 54 years of hard labor. *Id.* at 330. The majority refused to discuss the constitutionality of the contested punishment since the eighth amendment did not apply to the states. *Id.* Justices Field, Harlan and Brewer in their dissent, observed that the eighth amendment did apply to the states through the fourteenth amendment and that the eighth amendment was meant to prohibit tortuous methods of punishment as well as excessive or severe punishments that were grossly disproportionate to the offenses. Justice Field stated:

54 years confinement at hard labor, away from one's home and relatives, and thereby prevented from giving assistance to them or receiving comfort from them, is a punishment at the severity of which, considering the offenses, it is hard to believe that any man of right feeling and hearing can refrain from shuddering...the punishment was greatly beyond anything required by any humane law for the offenses.

Id. at 339-340.

31. *Weems*, 217 U.S. at 379.

32. *Id.* at 372.

33. *Id.*

34. 356 U.S. 86 (1958).

35. Denationalization is a penalty in which an individual's citizenship is taken away and the individual is rendered stateless.

36. *Trop*, 356 U.S. 86.

37. 217 U.S. 349 (1910).

the eighth amendment was not intended to be static.³⁸ The Court observed that the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."³⁹ The Court held that although the punishment involved no physical torture, destroying an individual's status in society was cruel and unusual punishment in accord with society's standards of decency.⁴⁰ Justice Brennan, in his concurring opinion, used a concept of excessiveness similar to *Weems*.⁴¹ Brennan observed that denationalization was an excessive punishment, when compared with other forms of punishment available for desertion, because it was an inefficient and unnecessary way to attain the legitimate penal aims of deterrence and rehabilitation.⁴²

The Supreme Court has used the progressive interpretation of the eighth amendment's cruel and unusual punishment clause set forth in *Weems* and *Trop* in many subsequent cases, most significantly to find under what circumstances the death penalty is, and is not, unconstitutional.⁴³ The Supreme Court

38. *Trop*, 356 U.S. at 101.

39. *Id.* The Court also noted that the cruel and unusual punishment clause was taken from the English Bill of Rights, and the principle it represents was taken from the Magna Carta; thus, the underlying concept of the eighth amendment is the dignity of man. *Id.* at 100.

40. *Trop*, 356 U.S. at 102. The Court further noted that denationalization, . . . is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community.

Id. at 101-102.

41. *Id.* at 110 (Brennan J., concurring).

42. *Id.* at 111 (Brennan J., concurring) Brennan explained that denationalization is the antithesis of rehabilitation, for instead of helping the individual to become a useful member of society, it makes him an outcast. Further, since the ramifications of denationalization are not yet known, it would not be an effective deterrent measure. Brennan noted that penal aims would be more successfully achieved by an alternate method of punishment. *Id.* at 113-114. (Brennan, J., concurring)

43. *Furman v. Georgia*, 408 U.S. 238 (1972). The issue was whether the imposition of the death penalty for the rape cases before the court was cruel and unusual punishment. The Supreme Court held that the death penalty in those cases constituted cruel and unusual punishment. Justice Brennan, in the concurring opinion, 408 U.S. 238, 256-305 (J. Brennan, concurring), thought that the death penalty should be eliminated in all situations. *Id.* at 256-305. He stated that "(t)he punishment of death stands condemned as fatally offensive to human dignity." *Id.* at 305. *But cf.*, *Gregg v. Georgia*, 428 U.S. 153 (1976), holding that a Georgia law imposing the death penalty for murder did not violate the eighth amendment and that the death penalty was not unconstitutional. *Id.* at 187. The Court reached this decision using the expanded interpretation of the cruel and unusual punishment clause. Contrary to *Furman*, the court found that the death penalty "comports with the basic concept of human dignity" and serves the legitimate penal purposes of retribution and deterrence; therefore, it is a justified and necessary punishment. *Id.* at 182.

has also used the concept of excessiveness in subsequent decisions to find that certain punishments and penal practices are unconstitutional.⁴⁴

B. THE APPLICATION OF THE EIGHTH AMENDMENT TO PRISON CONDITION CASES

The Supreme Court has long acknowledged that a prisoner does not leave his civil rights at the prison door.⁴⁵ Certain conditions of prison confinement have been held to be a part of punishment and therefore subject to scrutiny under the broad interpretation of the eighth amendment.⁴⁶ In *Estelle v. Gamble*⁴⁷ the Supreme Court applied the eighth amendment to prisons, noting that the Constitution imposes a duty upon the state to protect the prisoners' safety and well being.⁴⁸ This duty exists because the state has taken away the prisoners' liberty, and the prisoners are thus unable to care for themselves.⁴⁹ *Estelle* did not specifically deal with prison conditions but rather whether the inadequate treatment of an individual prisoner's medical needs constituted cruel and

44. See, e.g., *Robinson v. California*, 370 U.S. 660 (1962), holding that a state law making the status of narcotics addiction a criminal offense, punishable by at least 90 days in jail, was cruel and unusual punishment. The Court held that narcotics addiction was an illness, not a crime, and therefore not only was this punishment disproportionate, but also since it did not attempt to provide any medical or psychological aid to the addict, it did not serve any legitimate purpose. *Id.* at 675-675. See also, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972). Justice Marshall in his concurring opinion indicated that the death penalty was cruel and unusual punishment because of its excessiveness. He observed that it serves no legitimate penal purpose more effectively than the less severe punishment of life imprisonment. *Id.* at 358-359. (See *infra* note 43 for a discussion of the case) and see *O'Neil v. Vermont*, 144 U.S. 323 (1892). (See *infra* note 30 and the accompanying text for a discussion of this case).

45. See *Cooper v. Pate*, 378 U.S. 546 (1964). In this case a prisoner filed a civil rights complaint against the Illinois State Penitentiary on the grounds that he was not allowed to purchase certain religious publications and denied other privileges just because of his religion. The Supreme Court held that the complaint stated a valid cause of action. *Id.* at 546.

46. See *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Hutto v. Finney*, 437 U.S. 678 (1978) (See *infra* notes 47 and 53 and the accompanying text for a discussion of these cases). See also *Rhodes v. Chapman*, 452 U.S. 337 (1981). (See *infra* notes 58-62 and accompanying text for a discussion of this case).

47. 429 U.S. 97 (1976). In this case a prisoner in a Texas state prison brought a suit against the medical director and two prison officials claiming that his eighth amendment rights were violated because he was inadequately treated for a back injury allegedly sustained during prison work. The court denied his claim because he was unable to prove that the defendants were deliberately indifferent to his existing medical needs. *Id.* at 103-105.

48. *Id.* at 103.

49. *Id.* at 103-104.

unusual punishment.⁵⁰ The Court held that the only way for a prisoner to successfully challenge a deprivation of medical treatment was to show that the medical personnel or prison officials were deliberately indifferent to his treatment needs, for only such indifference constitutes the wanton infliction of pain prohibited by the eighth amendment.⁵¹ Since the prisoner was only able to provide evidence that the prison and medical personnel were at most inattentive or negligent to his needs, the eighth amendment was not violated.⁵²

*Hutto v. Finney*⁵³ was the first Supreme Court case to specifically acknowledge that conditions of confinement are a part of the punishment subject to eighth amendment scrutiny. The Court in *Hutto* focused on the objective harm to the prisoners caused by the challenged conditions of confinement⁵⁴ and not on the prison official's state of mind relied as required in *Estelle*.⁵⁵ The eighth amendment, the Court noted, prohibits severely disproportionate punishments⁵⁶ and punishments that violate "broad and idealistic concepts of dignity, civilized standards, humanity and decency."⁵⁷

50. *Id.* at 101.

51. *Estelle*, 429 U.S. at 106.

52. *Id.* Two important Supreme Court cases followed the reasoning in *Estelle* to deny the prisoners' claims. In *Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) the court held that prisoners' eighth amendment claims were invalid because they failed to show that the prison officials acted with deliberate or reckless indifference to the prisoners. *Id.* at 652. The claims stemmed from injuries sustained in a bus fire while being transported between prisons. *Id.* at 648.

In *Whitley v. Albers*, 475 U.S. 312 (1986) the Court held that, like in *Estelle*, prisoners must prove a mental element. However, instead of deliberate indifference, a prisoner must show that the prison officials acted maliciously and sadistically in cases concerning whether a particular prison security measure posed a risk to the prisoners' safety in violation of the eighth amendment. *Id.* at 319.

53. 437 U.S. 678 (1978). The Court considered the validity of certain remedial orders issued by the district court and affirmed by the Eighth Circuit after a finding that conditions within the Arkansas penal system constituted cruel and unusual punishment. The contested orders limited the amount of time that a prisoner could be put in punitive isolation and awarded attorneys' fees and costs as a sanction for failing to cure other eighth amendment violations. *Id.* at 680-688. The Supreme Court upheld the validity of the remedial orders. *Id.* at 688 - 689.

54. *Id.* at 685.

55. 429 U.S. 97 (1976). The Court noted that the district court appropriately analyzed whether indeterminate sentencing in the punitive isolation cells violated contemporary standards of decency. *Hutto*, 437 U.S. at 685.

56. *Id.* at 685 (quoting *Weems*, 217 U.S. at 367. See *infra* note 27 for a discussion of *Weems*).

57. *Id.* (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (1968) holding that the use of the strap on prisoners in Arkansas prison was cruel and unusual punishment in violation of eighth amendment and enjoining the prison from its use.

In *Rhodes v. Chapman*,⁵⁸ the Court considered whether double celling⁵⁹ prisoners constituted an eighth amendment violation.⁶⁰ The court observed that when determining whether an eighth amendment violation has occurred, the court must, as much as possible, use objective factors measured against society's standards of decency as to the effect of the deprivation.⁶¹ After reviewing relevant scientific evidence about double celling, the Court concluded that double celling did not offend contemporary standards of decency in violation of the eighth amendment.⁶²

The most recent Supreme Court case concerning unconstitutionality of conditions of confinement, *Wilson v. Seiter*,⁶³ has added to the standard regarding prison deprivations set forth in *Hutto* and *Rhodes*. The Court observed that conditions of confinement are not part of the punishment formally meted out by a statute or judge.⁶⁴ Therefore, in order to have any eighth amendment violation as to conditions, the prisoner must show that the prison officials intended to punish or at least were deliberately indifferent as to whether the condition was punishment.⁶⁵ Prior to this decision, a requirement that the prison officials had a purpose or intent to inflict harm was only required for cases involving medical treatment or guard brutality.⁶⁶

58. 452 U.S. 337 (1981).

59. Double celling is placing two prisoners in a cell designed to accommodate one prisoner.

60. *Rhodes*, 452 U.S. at 339.

61. *Id.* at 346-347.

62. *Id.*

63. 111 S. Ct. 2321 (1991). The court considered the issue of whether certain conditions of confinement within the Ohio prison violated the cruel and unusual punishment clause of the eighth amendment. The Court relied on *Whitley v. Albers*, 475 U.S. 312 (1986) (*See infra* note 52 for a discussion *Whitley*.) and observed that there is a distinction between punishment formally imposed for a crime and conditions of confinement. *Id.* at 2323-2324. The Court then relied on *Francis v. Resweber*, 329 U.S. 459 (1947) and *Estelle v. Gamble*, 429 U.S. 97 (1976) (*See infra* notes 26 and 47-51 and accompanying text for a discussion of *Resweber* and *Estelle*.) as supporting the proposition that for those punishments not formally meted out such as the conditions of confinement, an inquiry into the state of mind of the prison officials must be performed. *Id.* at 2323. The Court held a violation of the eighth amendment exists only if it can be shown that the prison officials were deliberately indifferent. *Id.* at 2326-2327.

64. *Wilson*, 111 S. Ct. at 2324.

65. *Id.*

66. *See Estelle v. Gamble*, 429 U.S. 97 (1976). *See infra* notes 47-51 and accompanying text for a discussion of the case.

C. THE UNCONSTITUTIONALITY OF CONDITIONS OF CONFINEMENT IN THE NINTH CIRCUIT PRIOR TO WILSON

The Ninth Circuit has also had occasion to apply the constitutional protection against cruel and unusual conditions of confinement afforded to prisoners through the eighth amendment. Prior to *Wilson*, the Ninth Circuit had consistently used the objective standard for prison condition cases focusing on the harm caused by the challenged conditions of confinement when determining if a eighth amendment violation had occurred.⁶⁷

In *Spain v. Procunier*,⁶⁸ the Ninth Circuit considered the constitutionality of certain prison conditions and practices in San Quentin prison.⁶⁹ The court held that use of dangerous amounts of tear gas violated society's contemporary standard of decency⁷⁰ and could only legitimately be used in certain situations.⁷¹ It also held that excessive use of mechanical restraints was dehumanizing and violated the minimum standards of decency protected by the eighth amendment.⁷²

67. However, the Ninth Circuit had applied the subjective deliberate indifference standard to medical treatment and prisoner security cases. *See, e.g., Berg v. Kincheloe*, 794 F.2d 457 (9th Cir. 1986). In this case a prisoner claimed that his eighth amendment rights had been violated due to the prison officials disregard for his personal safety which caused him to be beaten and raped. *Id.* at 458. The Ninth Circuit held that the prisoner had raised a valid eighth amendment claim concerning one of the prison officials and observed that the deliberate indifference standard would be appropriate to determine if this official violated the cruel and unusual punishment clause by exposing Berg to a threat of serious harm or injury by another prisoner. *Id.* at 459. *See also Franklin v. Oregon*, 662 F.2d 1337 (9th Cir. 1991), holding that in order for the prisoner to bring a valid eighth amendment claim concerning his deprivation of medical treatment and personal security, he must prove that prison officials acted with deliberate indifference. *Id.* at 1347.

68. 600 F.2d 189 (9th Cir. 1979). Six San Quentin prisoners, also known as the San Quentin Six, were involved in the protest over prison conditions that occurred at San Quentin in which some inmates and prison officials were killed. The San Quentin six brought suit against the prison for certain allegedly unconstitutional conditions and practices of confinement, including (1) excessive use of tear gas, (2) unreasonable use of mechanical restraints, and (3) denial of any outdoor exercise. *Id.* at 193-200.

69. *Id.*

70. *Id.* at 196, (citing *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958))).

71. *Procunier*, 600 F. 2d at 196. The court continued that this holding was not a ban on the use of tear gas in the prison but only a prohibition against the unjustified use of dangerous quantities of tear gas. Use of non-dangerous amounts of tear gas does not violate society standards of decency. *Id.*

72. *Id.* The court found that use of mechanical restraints during out of cell movements was "excessive, painful and degrading." *Id.* The Court found that the use of the mechanical restraints were particularly unjustified when visiting with friends, relatives and counsel. *Id.* at 197.

The court observed that even though there was no finding that the prison officials intentionally shackled the prisoners to punish them for the deaths of their fellow guards, wrongful intent is only one element of eighth amendment review and is not dispositive.⁷³ The state-of-mind of the prison official is something to consider when analyzing whether the punishment advances a legitimate penal purpose, but a eighth amendment violation may be found without a wrongful state-of-mind being shown.⁷⁴

In *Franklin v. State of Oregon*,⁷⁵ the Ninth Circuit held that a prisoner's complaint concerning inadequate ventilation, exercise and lighting were valid eighth amendment claims.⁷⁶ The court also held that housing a prisoner with lung cancer with a heavy smoker and denying the prisoner food after being informed that he was having an insulin reaction were potential eighth amendment violations.⁷⁷ Following *Estelle*,⁷⁸ the court observed, however, that for eighth amendment challenges involving medical mistreatment, the prisoner must not only show that his health was seriously threatened, but that the prison officials were deliberately indifferent to his medical needs.⁷⁹

In *Hoptowit v. Spellman*⁸⁰ the Ninth Circuit upheld the district court's conclusion that many of the prison conditions in the Washington State Prison were a serious threat to the

73. *Procunier*, 600 F.2d at 197.

74. *Id.*

75. 662 F.2d 1337 (9th Cir. 1981). The plaintiff, a prisoner in an Oregon state prison, had filed various complaints concerning unconstitutional conditions of confinement, including (1) inadequate ventilation, lighting and exercise, (2) placing him in a cell with a heavy cigarette smoker which was seriously dangerous to his health since he had lung cancer, and (3) failing to provide him with food after he informed the prison that he was having an insulin reaction. The court held that complaint (1) was a legitimate eighth amendment issue after *Procunier* and that complaints (2) and (3) also raised valid eighth amendment claims provided he could show that the prison officials were deliberately indifferent to his medical needs as required by *Estelle*. *Id.* at 1347.

76. *Id.* The court cited *Procunier*, 600 F.2d 189 (9th Cir. 1979) as precedent for its holding. *Id.* at 1346.

77. *Franklin*, 662 F.2d at 1347.

78. 429 U.S. 97 (1976). See *infra* notes 47-51 for a discussion of this case.

79. *Franklin*, 662 F.2d at 1347.

80. 753 F.2d 779 (9th Cir. 1985). In this case the Ninth Circuit held that inadequate lighting and ventilation, unsatisfactory plumbing, substandard fire prevention and food service, vermin infestation, lack of maintenance, safety hazards in the occupational areas, and inadequate cell cleaning fell "below the minimum standards of decency and violated plaintiffs' eighth amendment rights." *Id.* at 783.

prisoners' physical and mental health⁸¹ and their safety.⁸² The court held these conditions fell below the "minimum standards of decency"⁸³ and amounted to a eighth amendment violation.⁸⁴

In *McKinney v. Anderson*,⁸⁵ the Ninth Circuit held that the eighth amendment is violated when inmates are exposed to levels of Environmental Tobacco Smoke ("ETS")⁸⁶ that pose an unreasonable threat to their health.⁸⁷ The court held that society's attitude has evolved to a point where exposing an unwilling prisoner to dangerous levels of ETS violates contemporary standards of decency.⁸⁸ The court also held that this exposure was unconstitutional even without exploring the evolving standards of decency because courts had already determined that conditions of confinement that pose an unreasonable risk to a prisoner's health are unconstitutional.⁸⁹ The Fifth,⁹⁰ Sixth,⁹¹

81. *Id.*

82. *Id.*

83. *Id.*

84. *Hoptowit*, 753 F.2d at 783.

85. 924 F.2d 1500 (9th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3154 (U.S. Oct. 15 1991)(No. 91-269) (vacated and remanded for further consideration in light of *Wilson*).

86. *McKinney*, 924 F.2d at 1502. Environmental tobacco smoke, as opposed to mainstream cigarette smoke, which is the smoke that smokers draw directly into their lungs, is made up of mainstream smoke and sidestream smoke that cigarettes emit between puffs. *Id.* at 1502. The toxic and carcinogenic effects of both are similar. *Id.* at 1505 (citing U.S. Dep't of Health and Welfare, *The Health consequences of Involuntary Smoking, A Report of the Surgeon General* 7 (1986)).

87. *McKinney*, 924 F.2d at 1507.

88. *Id.* at 1508. The court relied on *Avery v. Powell*, 652 F. Supp. 632 (D.N.H. 1988) and *Clemmons v. Bohannon*, 918 F.2d 858 (10th Cir. 1990) to support its holding. *McKinney*, 924 F.2d at 1504-1505.

In *Avery*, the court held valid a claim that a prisoners' eighth amendment rights were violated because his constant exposure to ETS was harmful to his health. *Avery*, 652 F. Supp. at 641.

In *Clemmons*, the Tenth Circuit found that exposing a prisoner to an unreasonable risk of debilitating disease or death violated evolving standards of decency. *Clemmons*, 918 F.2d at 866. The court held the prisoner's claim, that involuntary exposure to ETS is cruel and unusual punishment, was a valid eighth amendment claim. *Id.* at 863.

89. *McKinney*, 924 F.2d at 1507. The court relied on *Procunier*, 600 F.2d 201 and *Hoptowit*, 753 F.2d 779, as having established that prisoners had a constitutional right to clean air; thus exposure to ETS would be unconstitutional per se, without an investigation into contemporary standards of decency. *McKinney*, 924 F.2d at 1507.

90. *See, e.g., Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974). The court found that the discriminatory practices, the condition of the physical facilities, the inadequacy of the medical treatment afforded the prisoners and other conditions offended modern concepts of decency in violation of the eighth amendment. *Id.* at 1299-1302.

91. *See, e.g., Cunningham v. Jones*, 567 F.2d 653 (6th Cir. 1977). The Sixth Circuit held that petitioner's claim that the jailers deliberately withheld food from him in order to coerce an confession for a offense committed in jail was a claim subject to scrutiny under the cruel and unusual punishment clause of the eighth amendment. *Id.* at 660.

Eighth,⁹² and Tenth⁹³ Circuits have also used the objective standard to find that certain conditions of confinement in the state prisons violated the eighth amendment.

III. WILSON V. SEITER - APPLICATION OF THE DELIBERATE INDIFFERENCE STANDARD TO PRISON CONDITIONS CASES

A. THE MAJORITY

In *Wilson v. Seiter*⁹⁴, the Court held that the deliberate indifference standard must be used when what is contested is not part of the punishment formally imposed by a statute or a sentencing judge.⁹⁵ The Court relied on its past decisions in *Resweber*,⁹⁶ *Estelle*,⁹⁷ and *Whitley*⁹⁸ to show that a state-of-mind inquiry must take place when determining whether a condition of confinement is cruel and unusual punishment.⁹⁹ The

92. See, e.g., *Martin v. Sargent*, 780 F.2d 1334 (8th Cir. 1985). The court held that petitioners' claims regarding the unhealthiness of the physical condition of the prison, the inadequate diet and lack of personal hygiene items raised valid eighth amendment claims. *Id.* at 1338.

93. See, e.g., *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1989). The court held that certain conditions at the Colorado prison, including inadequate sanitation, diet, safety and medical care, failed to provide prisoners with the "basic human needs" and violated the eighth amendment. *Id.* at 585-586.

94. 111 S. Ct. 2321(1991) (opinion by J. Scalia, with whom Rehnquist C.J., O'Connor, Kennedy and Souter J.J. joins. White J. filed concurring opinion in which Marshall, Blackmun and Stevens J.J. joined).

95. *Id.* at 2322-2328. The prisoners claimed that the conditions of confinement at the Ohio Prison constituted cruel and unusual punishment. The prisoners complained of overcrowding, excessive noise, unsanitary conditions, and dirty lavatories. They also stated that the prison was too hot in the summer and too cold in the winter, the food was prepared in unsanitary conditions and physically and mentally ill prisoners were intermingled with other prisoners, posing threats to their health and safety. *Wilson v. Seiter*, 893 F.2d 861, 863,864 (6th Cir. 1990).

96. 329 U.S. 459 (1947). See *infra* note 26 and accompanying text for a discussion of this case.

97. 429 U.S. 97 (1976). See *infra* notes 47-51 and accompanying text for a discussion of the case.

98. *Whitley v. Albers*, 475 U.S. 312 (1986). In this case a prisoner claimed that he was subject to cruel and unusual punishment when he was shot by a guard who was trying to quell a prison disturbance. *Id.* The Court held that in situations where prison officials have to make split second decisions as to whether to use force and end a protest or let the disturbance persist, the appropriate inquiry is whether force was used in good faith to restore discipline or maliciously and sadistically for the purpose of causing harm. *Id.* at 319.

99. *Wilson*, 111 S. Ct. at 2326. The Sixth Circuit applied the *Whitley* standard to the prisoners claim that the conditions of confinement violated the eighth amendment in *Wilson v. Seiter*, 893 F.2d 861 (6th Cir. 1989). The Supreme Court held that

Court observed that *Resweber* emphasized that a violation of the eighth amendment required a "wanton infliction of pain."¹⁰⁰ In *Resweber*, since the infliction of a repeat electrocution was due to an accident, the prison officials lacked the culpable state of mind to make the punishment cruel.¹⁰¹ The Court also observed that it had applied this culpability requirement in *Estelle* for deprivations suffered during imprisonment that were not specifically part of the punishment.¹⁰² Finally, the Court observed that its recent decision in *Whitley* confirmed that a mental element is required in prison condition cases where the conduct challenged is not part of the punishment formally meted out by a sentencing judge.¹⁰³ The Court concluded that collectively these cases demand that a subjective inquiry into the prison officials' state-of-mind must be performed when determining whether a violation of the eighth amendment has occurred in cases challenging the conditions of confinement.¹⁰⁴

The Court rejected the position that there should be a distinction between short-term or one time conditions, such as the use of force to quell a prison disturbance that would require a state-of-mind inquiry, and ongoing conditions.¹⁰⁵ The Court also rejected the distinction drawn by the concurrence between

the Sixth Circuit was correct in determining that a mental element was required but that the appropriate standard was deliberate indifference, not the malicious and sadistic standard. *Wilson* 111 S. Ct. at 2328.

100. *Resweber*, 329 U.S. at 463.

101. *Id.* at 464.

102. *Wilson*, 111 S. Ct. 2322 (citing *Estelle*, 429 U.S. 97 (1976) (*See infra* notes 47-51 and accompanying text for a discussion of the case).

103. *Id.* The Court cited a passage from *Whitley* in support of this proposition.

After incarceration, only the unnecessary and wanton infliction of pain... constitutes cruel and unusual punishment forbidden by the Eighth Amendment. To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety...It is obduracy and wantonness, not inadvertence or error in good faith that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs or restoring official control over a tumultuous cellblock. *Whitley*, 475 U.S. at 319.

Id. at 2323.

104. *Wilson*, 111 S. Ct. 2323.

105. *Id.* at 2325. This position was presented by the United States as amicus curiae in support of the prisoners. Brief for the United States as Amicus Curiae on Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit at 11-13, *Wilson v. Seiter*, 893 F.2d 861 (1991) (No. 89-7376).

specific acts or omissions aimed at individual prisoners at issue in *Whitley*, *Resweber*, and *Estelle* and general conditions of confinement.¹⁰⁶ The Court observed that there was no basis for these distinctions, and furthermore, it is not the inclinations of the courts that created the subjective element for eighth amendment review, it is the meaning inherent in the cruel and unusual punishment clause which required a state-of-mind inquiry.¹⁰⁷ To be considered punishment, acts must be deliberately intended to chastise or deter.¹⁰⁸ Conditions of confinement are not part of the punishment imposed for these penological purposes by the judge or a statute and cannot be considered a part of the punishment.¹⁰⁹ Only when some mental element is shown on the part of the prison officials does a challenged condition of confinement qualify as a punishment subject to eighth amendment scrutiny.¹¹⁰ The court concluded, in light of past decisions and the meaning inherent in the cruel and unusual punishment clause, a state-of-mind inquiry is necessary in determining whether conduct that is not part of the penalty violates the constitution.¹¹¹

In discussing what type of state-of-mind inquiry is applicable,¹¹² the Court relied on dictum from *Whitley*.¹¹³ The Court observed that once conduct is determined to be objectively severe,¹¹⁴ whether the resulting harm was wanton depends upon the constraints facing the prison official.¹¹⁵ Because prison officials face the same constraints handling medical conditions as any other conditions of confinement, the *Estelle* deliberate indifference standard should be used in both

106. *Wilson*, 111 S. Ct. at 2324.

107. *Id.*

108. *Id.* (quoting *Duckworth v. Franzen*, 780 F. 2d 645 (7th Cir 1985)). (See *infra* note 52 for a discussion of the case.) The Court quoted Judge Posner:

The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today, it is what it meant in the eighteenth century....[I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868 or 1985. *Duckworth*, 780 F.2d at 652.

Wilson, 111 S. Ct. 2324.

109. *Id.*

110. *Id.*

111. *Id.* at 2326.

112. *Wilson*, 111 S. Ct. at 2326. The Court explained objective severity as conduct that satisfies the *Rhodes* evolving standards of decency test. *Id.*

113. *Whitley v. Albers*, 475 U.S. 312, 319-321 (1986).

114. *Wilson*, 111 S. Ct. at 2326.

115. *Id.*

situations.¹¹⁶ The Court rejected the stricter malicious and sadistic standard applied in *Whitley*, because the prison officials are faced with different constraints when acting in response to the more threatening circumstances of a prison disturbance.¹¹⁷

B. THE CONCURRENCE¹¹⁸

The concurrence agreed with the majority in judgment only.¹¹⁹ The concurrence strongly disagreed that prisoners who challenge the conditions of confinement within a prison must show deliberate indifference by the prison officials.¹²⁰ The concurrence disagreed with the majority's holding for three reasons: it is contrary to precedent, it will be impossible to apply, and it will create a easy defense to any constitutional challenge.¹²¹

The concurrence tacitly rejected the majority's conclusion that a mental element is required because the conditions of confinement are not part of the punishment formally meted out by the sentencing judge or statute.¹²² The concurrence observed that the Court had previously held in *Hutto*¹²³ and *Rhodes*¹²⁴ that although not formally imposed by a sentencing judge or statute, conditions of confinement are part of the punishment subject to eighth amendment scrutiny.¹²⁵ As part of the punishment,

116. *Id.* This reasoning was derived from *Lafaut v. Smith*, 834 F.2d 389 (4th Cir. 1987) (involving a complaint by a paraplegic inmate that the prison officials violated the eighth amendment due to the inhumane conditions of his confinement and their failure to provide him with needed physical therapy). The Court noted that *Lafaut* established that whether the prisoner's treatment is characterized as inadequate attention to his medical needs or inhumane conditions of confinement, *Estelle's* deliberate indifference standard should be used. *Lafaut*, 834 F.2d at 391-392. *Wilson*, 111 S. Ct. 2326.

117. *Id.* at 2328. The court concluded that the Sixth Circuit erred in applying the *Whitley* standard and remanded the case for reconsideration in light of the opinion. The court noted that since the Sixth Circuit had found that the prison officials acted with at most mere negligence, using the deliberate indifference standard instead of *Whitley's* malicious and sadistic standard will not change the outcome of the case. *Id.*

118. *Wilson*, 111 S. Ct. 2321, 2328 (1991) (White, J., Marshall, J., Blackmun, J. and Stevens, J. concurring).

119. *Id.*

120. *Id.*

121. *Id.* at 2328-2330.

122. *Wilson*, 111 S. Ct. at 2328. The concurrence observed that the majority did not dispute that the intent element is not needed when the pain and suffering complained of is part of the punishment imposed on convicted prisoners. *Id.*

123. 437 U.S. 678 (1978).

124. 452 U.S. 337 (1981).

125. *Wilson*, 111 S. Ct. at 2328-2329.

the objective severity of the conditions and not the prison officials' state of mind must be examined when determining if the eighth amendment has been violated.¹²⁶

The concurrence argued that the majority's reliance upon *Resweber*,¹²⁷ *Estelle*¹²⁸ and *Whitley*¹²⁹ to support the necessity of an intent element in prison condition cases was misplaced.¹³⁰ These cases challenged specific acts or omissions directed at individual prisoners.¹³¹ A state-of-mind inquiry was required because these cases concerned conduct which was aimed at particular prisoners in isolated incidents which did "not purport to be punishment at all."¹³² Because these cases did not involve conduct that was part of punishment, they were inappropriate precedent to establish that an intent element is necessary in cases concerning prison conditions, since prison conditions have been held to be part of punishment.¹³³

The concurrence pointed out the difficulty of applying the subjective standard as an additional reason why only the objective conditions of confinement should be examined.¹³⁴ It observed that it will be very difficult to determine whose intent should be scrutinized, since conditions of confinement often result from the actions and omissions of numerous prison officials in and out of the prison.¹³⁵ The concurrence noted that the majority did not address how this problem will be dealt with and that "[i]n truth intent simply is not very meaningful when considering a challenge to an institution such as a prison

126. *Id.* The concurrence quoted language from *Rhodes*:
Conditions (of confinement)..., may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standards of decency....*Rhodes*, 452 U.S. at 347.

Id. at 2328.

127. 329 U.S. 459 (1947).

128. 429 U.S. 97 (1976).

129. 475 U.S. 312 (1986).

130. *Wilson*, 111 S. Ct. at 2329.

131. *Id.* In *Resweber*, 329 U.S. 459 (1947) the prisoner challenged the constitutionality of subjecting him to a repeat execution. In *Estelle*, 429 U.S. 97 (1976) the prisoner challenged the inadequate attention to his serious medical needs. *Whitley*, 475 U.S. 312 (1986) concerned a prisoner's challenge to the constitutionality of a prison guard shooting him during the course of a prison riot.

132. *Wilson*, 111 S. Ct. at 2329 (quoting *Whitley*, 475 U.S. at 319).

133. *Id.* The concurrence cited *Gillespe v. Crawford*, 833 F.2d 47, 50 (5th Cir. 1987) (per curiam) as establishing this argument.

134. *Wilson*, 111 S. Ct. at 2329.

135. *Id.* at 2330.

system."¹³⁶ This is why, noted the concurrence, lower courts have consistently applied the objective standard.¹³⁷

The concurrence indicated that the most significant and potentially dangerous result of the majority's holding is that it will open up the possibility for a easy defense to an eighth amendment claim.¹³⁸ Prison officials will be able to claim that it is inadequate funds, not a wrongful state of mind, that has created the contested conditions of confinement.¹³⁹ The concurrence concluded that inhumane conditions of confinement should not be shielded from eighth amendment scrutiny due to inadequate funding.¹⁴⁰ Having made the choice to use prisons as a form of punishment, each state must take responsibility to ensure that the conditions in its prisons comport with contemporary standards of decency.¹⁴¹ A requirement of deliberate indifference will mean that serious deprivations of basic human needs in the prisons will go unredressed.¹⁴²

IV. AFTER WILSON - THE APPLICATION OF THE DELIBERATE INDIFFERENCE STANDARD IN THE NINTH CIRCUIT

Only a small number of decisions concerning cruel and unusual conditions of confinement the prisons have been handed down by the Ninth Circuit since *Wilson*.¹⁴³

136. *Id.*

137. *Id.* at n.1.

138. *Wilson*, 111 S. Ct. at 2330.

139. *Id.* For example, if a prisoner complains about inadequate nutrition or sanitation the prison officials can claim it is budget considerations that created the unhealthy environment and not their intent to harm the prisoners.

140. *Id.* The majority addressed this issue briefly in response to the amicus brief filed by the U.S. Brief for the United States As Amicus Curiae on Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit at 11-13, *Wilson v. Seiter*, 893 F.2d 861 (1990). It acknowledged that fiscal constraints may provide a defense to eighth amendment challenges, but it cannot bear on the meaning of the intent requirement that is implicit in the cruel and unusual punishment clause. *Wilson*, 111 S. Ct. 2325. Further, the majority stated that the "cost" defense was not an issue in the case. *Id.*

141. *Id.*

142. *Id.*

143. See *Smith v. McCarthy*, 937 F.2d 613 (9th Cir. 1991) (Table) (No. 89-15540) (unpublished disposition, text in WESTLAW, Allfeds Library) (See *infra* note 144 and accompanying text for a discussion of this case). See also *Redman v. San Diego*, 942 F.2d 1435 (9th Cir. 1991). (See *infra* note 151 and accompanying text for a discussion of the case); *Whitmore v. Sumner*, 944 F.2d 910 (9th Cir. 1991)(Table) (No. 89-15861) (unpublished disposition, text in WESTLAW, Allfeds Library) (See *infra* note 161 and accompanying text for a discussion of the text); *Jordon v. Gardner*, ___ F.2d ___ (9th Cir. 1992) 1992 WL 2084; *Lane v. Martinak*, ___ F.2d ___ (9th Cir. 1991) (Table) (No. 90-35805) (unpublished disposition, text in WESTLAW, Allfeds Library); and *Schultz v. Goldsmith*, 942 F.2d 951 (9th Cir. 1991) (Table) (No. 90-16620) (unpublished disposition, text in WESTLAW, Allfeds Library).

In *Smith v. McCarthy*¹⁴⁴ the Ninth Circuit held that the prisoner's challenge to certain conditions in administrative confinement, namely inadequate shelter and lack of outdoor exercise, presented valid eighth amendment claims.¹⁴⁵ The court cited *Hoptowit*¹⁴⁶ as establishing both that all prisoners must be afforded eighth amendment protection, including those in administrative segregation, and that prisoners must be provided adequate shelter.¹⁴⁷ The court observed that *Procunier*¹⁴⁸ established that denial of outdoor exercise may constitute cruel and unusual punishment.¹⁴⁹ The court concluded, however, that after *Wilson* these claims will only be successful if the petitioner can show that the prison officials acted with deliberate indifference.¹⁵⁰ Although the Ninth Circuit adopted the deliberate indifference standard in this case, it did not indicate what the petitioner will have to prove to show such indifference.

In *Redman v. San Diego*¹⁵¹ the issue before the court was whether improperly placing a pre-trial detainee in a dangerous situation, despite his pleas for protection, violated his fourteenth amendment due process right to personal security.¹⁵² The court held that deliberate indifference was the appropriate standard to use when determining if an inmate's right of personal security had been violated.¹⁵³ Deliberate indifference

144. 937 F.2d 613 (9th Cir. 1991) (Table) (No. 89-15540)(unpublished disposition text in WESTLAW, Allfeds Library). A prisoner claimed that his eighth amendment rights were violated when he was arbitrarily moved from general population to administrative segregation. In administrative segregation he claimed he was denied outdoor exercise and adequate shelter. *Id.*

145. *Id.* (citing *Wilson*, 111 S. Ct. 2321 (1991) as establishing the deliberate indifference standard). The court held that Smith's contention that he was arbitrarily placed in segregation, subject to retaliatory action by the prison officials, and that the defendants were deliberately indifferent to his medical needs and safety and used excessive force in stopping a prison riot, as well as the contention that the defendants were racially discriminatory, lacked merit. *Id.*

146. 753 F.2d 779 (9th Cir. 1985).

147. *Smith*, 937 F.2d 613.

148. 600 F.2d 189 (9th Cir. 1979).

149. *Smith*, 937 F.2d 613 (citing *Procunier*, 600 F.2d at 199-200.).

150. *Id.*

151. 942 F.2d 1435 (9th Cir. 1991). Redman, a pre-trial detainee who was repeatedly raped by another inmate despite his pleas for protection, filed a complaint against the prison officials and the County of San Diego alleging his fourteenth amendment due process rights were violated. He alleged that his rights were violated because the defendants committed acts that deprived him of his rights to personal security. *Id.* at 1439. (Since Redman was a pre-trial detainee and had not been convicted of a crime, he had to posture his action as a deprivation of substantive due process rights instead of a violation of the eighth amendment.). *Id.*

152. *Id.* at 1439.

153. *Redman*, 942 F.2d at 1443.

was shown on the part of the county and the prison officials because they were responsible for developing and implementing the procedural policies and customs which maintained the overcrowding in the jails.¹⁵⁴ This overcrowding knowingly resulted in a lack of supervision, which created safety problems in the jail.¹⁵⁵ To deal with the overcrowding, prison officials developed the custom of placing prisoners in improper areas, posing an unconstitutional risk of harm to Redman's personal security.¹⁵⁶

The Ninth Circuit dealt with personal security issues in the context of a eighth amendment challenge in *Jordan v. Gardner*.¹⁵⁷ The court in *Jordan*, without referring to the deliberate indifference standard, rejected the women prisoners' challenge to cross-gender pat searches.¹⁵⁸ The court observed that although the pat searches may be unpleasant they do not violate evolving standards of decency.¹⁵⁹ The Ninth Circuit concluded that pat searches are necessary and legitimate means of addressing internal security and therefore no eighth amendment violation had occurred.¹⁶⁰

154. *Id.* at 1443-1446.

155. *Id.*

156. *Id.* But see *Lane v. Martinank*, 951 F.2d 360 (9th Cir. 1991) (Table) (No. 90-35805) (unpublished disposition, text in WESTLAW, Allfeds Library). The Court rejected a 14th amendment challenge by a pre-trial detainee to the conditions of confinement. Lane had claimed that his constitutional rights were violated when he was served maggot and boll weevil infested food. The court applied the deliberate indifference standard and found that Lane had failed to show that the prison officials were deliberately indifferent since they replaced the infested meal as soon as it was discovered. *Id.*

157. ___ F.2d ___ (9th Cir. 1992), 1992 WL 2084.

158. Cross-gender pat searches are when a prison guard pat searches a prisoner of the opposite sex. The pat searches at issue in this case included a search of the breast and crotch area of the prisoner.

159. *Jordan*, at *6. The court observed that the Supreme Court has upheld prisoner searches more intrusive than the cross-gender pat searches, including body cavity searches, these fully clothed searches do not offend modern standards of decency. *Id.*

160. *Id.* at *5. The court noted that it was required to give great deference to prison officials' policies regarding internal security. Because the cross-gender pat searches were implemented for legitimate security purposes they do no amount to the "gratuitous infliction of suffering" necessary for a eighth amendment violation. *Id.*

Justice O'Scannlain in his dissent pointed out that a eighth amendment violation requires that the challenged activity constitute unnecessary and wanton infliction of pain. He noted that the evidence more than supported that there was unreasonable risk of harm to the prisoners from the pat searches. *Jordan* ___ F.2d ___ (9th Cir. 1992), 1992 WL 2084 at *9. (J. O'Scannlain concurring in part and dissenting in part) and that the searches were unnecessary and without penological justification. *Id.* at *10. Most importantly he observed that the majority completely ignored the issue of whether the infliction of pain was wanton. *Id.*

In *Whitmore v. Sumner*¹⁶¹ the Ninth Circuit addressed how the deliberate indifference standard should be applied.¹⁶² The court observed that in cases challenging prison conditions, the prisoner must prove an objective component, whether there was a serious deprivation of rights, and a subjective component, whether the prison officials acted with deliberate indifference.¹⁶³ The court denied that the plaintiffs had provided

Citing *Wilson*, Justice O'Scannlain, stated that for eighth amendment claims based on conduct that is not part of the formal punishment meted out by a judge or statute, deliberate indifference satisfies the wantonness requirement. Furthermore, since the prison officials were aware of the negative psychological impact cross-gender searches would have on the women prisoners before the policy was implemented, the prisoners met their burden of establishing deliberate indifference. *Id.* at *11.

161. 944 F.2d 910 (9th Cir.1991)(Table)(No. 89-15540)(unpublished disposition, text in WESTLAW, Allfeds Library.) Prisoners claimed that their eighth amendment rights had been violated because the prison officials allowed an HIV-infected inmate, who had previously thrown his bodily fluids at others, to deliver meals to the cells. *Id.*

162. *Id.* See also *Schultz v. Goldsmith*, 947 F.2d 951 (9th Cir. 1991) (Table)(No. 90-16620) (unpublished disposition, text in WESTLAW, Allfeds Library.)(holding that although the prisoner may have shown that his exposure to ETS caused him an unreasonable risk of harm, the case must be remanded so that he may amend the complaint to show deliberate indifference.) and see *Jordan* ___ F.2d ___ (9th Cir. 1992), 1992 WL 2084 at *9. (J. O'Scannlain concurring in part and dissenting in part)(noting that a eighth amendment claim includes an objective finding of harm and a subjective inquiry into the prison officials state of mind). *Id.*

163. 944 F.2d 910 (9th Cir. 1991) (Table) (unpublished dispositions, text in WESTLAW, Allfeds Library). This two prong standard was implied in *Wilson*, 111 S. Ct. 2321 and has been consistently applied after *Wilson*. See, e.g., *Smith*, 937 F.2d 613 (9th Cir. 1991) (Table) (No. 89-15540)(unpublished disposition, text in WESTLAW, Allfeds Library) In *Smith* the Ninth Circuit relied upon its decision in which it applied the objective standard prior to *Wilson* to establish that the challenged conditions in *Smith* were subject to eighth amendment scrutiny. The court suggested that the subjective standard be applied to determine whether the prison officials acted with deliberate indifference to those conditions. *Id.*

See also *Johnson v. Williams*, 768 F. Supp. 1161 (E.D. VA 1991). The court held that the restrictions placed on prisoners during a prison lockdown did not violate the eighth amendment. The court observed, "no eighth amendment claim is stated unless plaintiff establishes both that conditions were sufficiently serious and that defendants were deliberately indifferent to those conditions." *Id.*

Almost all of the other Circuits that have addressed this issue since *Wilson* have also interpreted the deliberate indifference standard as involving both a subjective and objective component. See, e.g., *Henderson v. DeRobertis*, 940 F.2d 1055 (7th Cir. 1991). (held that defendants were deliberately indifferent to prisoners by exposing them to freezing temperatures without protection in violation of the eighth amendment). The Seventh Circuit observed that certain conditions of confinement, such as providing inadequate heat, have been held to be objectively in violation of the eighth amendment and that only the subjective element required has changed. *Id.*

See also, e.g., *Alberti*, 937 F.2d 984 (5th Cir. 1991) (held that state could be held liable for the conditions in the jail system but remanded the decision to determine if state was deliberately indifferent). The Fifth Circuit observed that *Wilson's* deliberate indifference requirement is not completely separate from the objective requirement of *Rhodes*. *Id.* To meet the deliberate indifference requirement prison officials must be aware of objectively cruel conditions and fail to fix them. *Id.*

enough evidence to satisfy the strict subjective standard required after *Wilson*.¹⁶⁴

V. THE APPLICATION OF THE DELIBERATE INDIFFERENCE STANDARD IN OTHER CIRCUITS

Because there have been only a few cases decided in the Ninth Circuit concerning prison conditions since *Wilson*, the opinions from other circuits may help to define how the *Wilson* test will be applied in the Ninth Circuit. The Fifth Circuit in *Alberti v. Sheriff of Harris County, Tex.*¹⁶⁵ used reasoning similar to *Redman* to find that the jail and prison officials may have been deliberately indifferent to the inmates' rights under the eighth amendment.¹⁶⁶ In this case the inmates in Texas jails challenged the deplorable conditions of confinement caused by severe overcrowding.¹⁶⁷ This overcrowding was caused by the state's policy of leaving "prison ready felons"¹⁶⁸ in county jail in order to eliminate the state prison overcrowding.¹⁶⁹ The court observed that because the state and county chose to leave "prison ready-felons" in the jail despite that fact that the overcrowding made the conditions of confinement unconstitutional,¹⁷⁰

164. *Whitmore*, 944 F.2d 910 (9th Cir.1991)(Table)(No. 89-15540)(unpublished disposition, text in WESTLAW, Allfeds Library.) Judge Fletcher in his dissent, observed that the plaintiffs had provided sufficient evidence to prove a eighth amendment violation after *Wilson*. Fletcher stated:

Here, plaintiffs presented evidence that prison officials placed plaintiffs in contact with an HIV-infected inmate who had not only thrown his urine at other inmates, but had also engaged in self-mutilation in an effort to infect other persons through contact with his blood. Plaintiffs also presented evidence that suggested that prisons officials had taken precautions to protect the staff of the correctional facility, but did not show similar concern for the safety of the prisoners....

Whitmore, 944 F.2d 910 (9th Cir.1991)(Table)(No. 89-15540)(unpublished disposition, text in WESTLAW, Allfeds Library.) (J. Fletcher dissenting).

165. 937 F.2d 984 (5th Cir. 1991).

166. *Id.* at 998-1000. The court noted that the deliberate indifference standard would likely be met. However, since *Wilson* was decided while the case was pending review, the court was reluctant to rule that the defendants were deliberately indifferent as a matter of law. *Id.* at 1000.

167. *Id.* at 986.

168. Prison ready felons or ready felons are terms used to refer to persons convicted of felonies who are ready to start state prison terms.

169. *Alberti*, 937 F.2d at 998-1000.

170. *Id.* This case originated over 20 years ago. Various remedial orders and preliminary injunctions have been issued to the County and State to make the conditions of confinement within the prisons and jails comply with the constitution. At this point in the litigation, the State and the County are not disputing the fact that the jail is overcrowded and the conditions of confinement are unconstitutional, rather they are fighting over who is responsible for the situation. *Id.* The county contends that

they could be found to be deliberately indifferent to the prisoners.¹⁷¹

The Fifth Circuit also acknowledged that *Wilson* required an additional consideration in the deliberate indifference equation.¹⁷² The court observed that when determining if a defendant has been deliberately indifferent, the constraints facing the defendant must be examined.¹⁷³ This requires that the court consider the possible reasons why defendants may have delayed or chosen to maintain certain situations that led to a constitutional deprivation.¹⁷⁴ The Fifth Circuit acknowledged in *Alberti* that the State had many common-sense alternatives available other than refusing to admit ready-felons which created the overcrowding in the jails.¹⁷⁵ The court also observed that the constraints allegedly imposed by lack of legislative funding could be considered but would not be dispositive.¹⁷⁶

the jails are overcrowded because of the state's admissions policy that failed to accept convicted felons housed in county jails but sentenced to state prison. The state contends that the jail would be overcrowded anyway and that problems existed within the jail despite the amount of ready felons. *Id.*

The lower court determined that as a result of the overcrowding over 2900 prisoners had to sleep on the floor. There also was inadequate plumbing, ventilation, fire safety, supplies, food and staff to ensure personal safety. *Id.* at 990.

171. *Alberti*, 937 F.2d 984.

172. *Id.* at 998.

173. *Id.* The dissent in *Redman*, 942 F.2d 1415 (9th Cir. 1991). (J. Thompson and J. Alarcon, dissenting), also acknowledged that the constraints facing the prison officials must be taken into consideration when determining if they were deliberately indifferent. *Id.* at 1450. The dissent observed that this is why the courts must defer to the prison officials informed decisions because only they understand the competing concerns that exist within a prison. *Id.*

174. *Alberti*, 937 F.2d 984 at 998-999.

175. *Id.*

176. *Id.* at 999-1000. The court noted that prior to *Wilson*, "inadequate funding [would] not excuse the perpetration of unconstitutional conditions of confinement." *Id.* (Citing *Gates v. Collier*, 501 F.2d 1291, 1319-20 (5th Cir. 1974) (See *infra* note 90 for a discussion of the case), and that other circuits, including the Ninth, have found deliberate indifference over allegations of inadequate funding. *Id.* (citing *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1985), *Ancata v. Prison Health Services, Inc.*, 759 F.2d 700, 705 (11th Cir. 1985) and *Wellman v. Faulkner*, 715 F.2d 269, 274 (7th Cir. 1983)). The court also noted that this issue is likely to be discussed frequently after *Wilson* since the Supreme Court did not specifically address the issue. *Id.*

The dissent in *Redman*, 942 F.2d 1415, 1450 (9th Cir. 1991) (J. Fernandez, dissenting) observed that if it was found that overcrowding led to the policy of improperly placing inmates in situations that pose a risk to their safety and that the prison policymakers allowed the facility to be overcrowded, then deliberate indifference could be found. Furthermore, the fact that the overcrowding might be a result of economics would not change the culpability. *Id.* at 1456. Justice Fernandez stated, "That kind of economics does not define our constitutional rights. In any event, economists have expatiated on the value to be found in enforcement of individual rights when we wish to encourage people to rethink their attitudes toward imposing risks on others in order to save initial outlays of money by themselves." *Id.*

In *Henderson v. DeRobertis*,¹⁷⁷ the Seventh Circuit succinctly enunciated what is required to show deliberate indifference.¹⁷⁸ This case involved the issue of whether exposing two prisoners to extremely cold temperatures without any protection violated the eighth amendment.¹⁷⁹ The court observed that deliberate indifference could be inferred if the prison officials had actual knowledge of potential harm to the prisoners from the objectively severe conditions, that harm was easily preventable,¹⁸⁰ and yet they failed to prevent it.¹⁸¹ The court found that there was sufficient evidence to prove that the defendants knew the inmates were exposed to hazardously cold conditions in violation of their constitutional right to adequate heat, and they could have avoided the harm to the prisoners by giving them adequate protection but did not.¹⁸² Therefore, their conduct constituted deliberate indifference to the prisoners' eighth amendment rights.¹⁸³

Only one decision to date, *Steady v. Thompson*,¹⁸⁴ has attributed a strict interpretation of the deliberate indifference standard, where the prisoners must show that the prison officials intended their discomfort.¹⁸⁵ In this case, similar to *McKinney*,¹⁸⁶ the court considered whether exposing prisoners to ETS constituted cruel and unusual punishment.¹⁸⁷ The court held that there was no constitutional violation because when the prison officials decided to allow smoking, they did not do so with the intent to harm non-smokers.¹⁸⁸ Consequently, the prisoners had not met the deliberate indifference standard.¹⁸⁹

177. 940 F.2d 1055 (9th Cir. 1991).

178. *Id.* at 1059.

179. *Id.* at 1056.

180. *Id.* at 1059. The court observed that a prisoners rights to adequate heat has long been established and is constant, therefore the defendants had actual knowledge that exposing the prisoners to freezing temperatures without adequate protection was in violation of the constitution. *Henderson* 940 F.2d at 1060.

181. *Id.* at 1059 (citing *Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) (*See infra* note 52 for a discussion of the case)).

182. *Henderson* 940 F.2d at 1060.

183. *Id.*

184. 941 F.2d 498 (7th Cir. 1991). (held that prison officials were not deliberately indifferent to prisoners by exposing them to ETS, since they did not intend to harm them by exposing them to such smoke).

185. *Id.* at 499.

186. 924 F.2d 1500 (9th Cir. 1990), *cert. granted*, 60 U.S.L.W. 3154 (U.S. Oct. 15 1991) (vacated and remanded for further consideration in light of *Wilson*). *See infra* notes 85-89 and accompanying text.

187. *Steady*, 941 F.2d at 499.

188. *Id.*

189. *Id.* By requiring this concept of an intent to harm, the court seems to be mistakenly applying the malicious and sadistic standard from *Whitley*, 475 U.S. 312 (1986) rather than the deliberate indifference standard.

VI. CONCLUSION

Most of the decisions in the courts concerning challenges to the constitutionality of prison conditions after *Wilson* have applied the deliberate indifference standard as a two-prong test. Under this test, the prisoners must prove that the conditions of confinement are objectively severe, and also show that the prison officials knew of the severity of the conditions and yet chose to ignore or delay the prevention of the harm that results from these conditions. Relying on past cases, the Ninth Circuit has been able to find that the challenged conditions were objectively severe and resulted in harm to the prisoners.¹⁹⁰ However, on the issue of deliberate indifference the court has either found that none existed¹⁹¹ or remanded with doubt that such will be found.¹⁹² *Redman*¹⁹³ is the only Ninth Circuit case to date where deliberate indifference has been found. The court explicitly indicated in *Redman* that its analysis and conclusions pertain only to fourteenth amendment due process challenges where a prisoner's right to personal security has been violated.¹⁹⁴

The difficulty that prisoners have had and will likely have in the future of showing deliberate indifference in cases challenging the conditions of confinement in the Ninth Circuit, might be explained by the problems predicted by

190. See *Smith*, 937 F.2d 613 (9th Cir. 1991) (Table) (No. 89-15540)(unpublished disposition, text in WESTLAW, Allfeds Library)(to deprive prisoners or adequate food, clothing, shelter, sanitation, etc, in administrative segregation violates the eighth amendment if prison officials act with deliberate indifference). See also *Whitmore*, 944 F.2d 910 (Table) (No. 89-15861)(unpublished disposition, text in WESTLAW, Allfeds Library) (plaintiffs had not offered enough evidence to prove the subjective component of the standard.).

191. See *Whitmore*, 944 F.2d 910 (Plaintiff did not offer enough evidence to find deliberate indifference), and see *Hernandez v. Lewis*, 942 F.2d 791 (9th Cir. 1991) (Table) (No 90-16434)(unpublished disposition, text in WESTLAW, Allfeds Library) (holding plaintiff failed to provide any genuine issues of material fact that the prison official were deliberately indifferent to his medical needs.), *Martinak*, 951 F.2d 360 (9th Cir. 1991) (Table) (No. 90-35805) (unpublished disposition, text in WESTLAW, Allfeds Library)(no facts suggest deliberate indifference by prison officials), *Addleman*, ___ F.2d ___, (9th Cir. 1991) (Table) (No. 99-15651) (unpublished disposition, text in WESTLAW, Allfeds Library). (nothing in the record indicates that the prison officials were deliberately indifferent to the prisoner).

192. See *Smith*, 937 F.2d 613 (9th Cir. 1991) (Table) (No. 89-15540)(unpublished disposition, text in WESTLAW, Allfeds Library)(remanded to District Court on issue of deliberate indifference).

193. 942 F.2d 1415 (9th Cir. 1991).

194. *Id.*

the concurrence in *Wilson*¹⁹⁵ and the Amicus Curiae.¹⁹⁶ These authorities explained that a subjective component is inappropriate in eighth amendment review. Such a standard is inappropriate because it is contrary to precedent¹⁹⁷ and unsupported by the language, history or intent of the eighth amendment.¹⁹⁸ In addition, these authorities predicted that it may be difficult to find fault on the part of the prison officials because inhumane prison conditions, unlike specific instances of violence or inadequate attention to a prisoners medical needs,¹⁹⁹ often are the result of high demands on the prison officials and not the result of an intention to harm the prisoners.²⁰⁰

The concurrence raised another potential problem with the use of the deliberate indifference standard: the prison official's ability to use lack of resources as a defense to eighth amendment claims.²⁰¹ This defense will enable a prison official to claim that it is inadequate funding and not any wrongful

195. *Wilson*, 111 S. Ct. 2321(1991) (White, J., Marshall, J. Blackmun, J. and Stevens, J. concurring).

196. Brief for the United States As Amicus Curiae on Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit at 11-13, *Wilson v. Seiter*, 893 F.2d 861 (1991) (No. 89-7376)(hereinafter cited as U.S. Brief).

197. *Wilson*, 111 S. Ct. 2321, 2328-2329 (White, J., Marshall, J. Blackmun, J. and Stevens, J. concurring) (citing *Hutto*, 437 U.S. 678 (1978) and *Rhodes*, 452 U.S. 337 (1981)).

198. U.S. Brief at 5. The United States explained that the text of the eighth amendment does not include any intent language. *Id.* at 15. Punishment refers to methods or kinds of punishment, and cruel refers to the type of prohibited punishment without respect to intent. *Id.* Furthermore, the framers had not meant to import an intent element; they were primarily concerned with prohibiting tortuous and excessive methods punishment. *Id.* at 16. Finally, the United States observed that the Supreme Court has consistently interpreted the clause to prohibit barbarity and to promote contemporary standards of humanity and decency. *Id.*

199. *Id.* at 18 (citing *Whitley*, 475 U.S. 312(1986) and *Estelle*, 429 U.S. 97 (1976)).

200. *Id.* at 19. The United States stated:

[S]eriously inhumane, pervasive conditions should not be insulated from constitutional challenge because the officials managing the institution have inhibited a conscientious concern for ameliorating its problems and have made efforts (albeit unsuccessful) to that end... the failure of the government to meet inmates' basic human needs constitutes cruel and unusual punishment whether or not fault can be clearly ascribed to the particular officials responsible for running the facility.

Id.

See also Branham, *When Are Prison Conditions Cruel and Unusual?* Preview of the United States Supreme Court Cases 1990-1991 Term. Issue No. 6 (ABA February 1991) This article discusses the possible outcomes of the Supreme Court's *Wilson v. Seiter* decision.

201. *Wilson*, 111 S. Ct. at 2330.

intent that created the inhumane condition. Although the Ninth Circuit indicated in one instance that economic considerations will not be allowed to deprive prisoners of their eighth amendment rights,²⁰² and other circuits have also observed that states may have to deal with their problems of overcrowding without making the legislature the culprit,²⁰³ the Supreme Court dismissed the issue as having no bearing on the consideration of whether an intentional element is needed for eighth amendment review.²⁰⁴ Therefore, there still is significant opportunity for the Supreme Court to rule dispositively on the issue.

Due to the excessive overcrowding in the prisons and the acknowledged lack of available funds to remedy the situation, if the Court decides that economic constraints should be considered in the deliberate indifference equation, the possibility of a prisoner successfully challenging the conditions of confinement will be significantly restricted.²⁰⁵ Almost any inhumane prison condition could be construed to be a result of inadequate funds. For example, a prisoners' challenge to lack of outdoor exercise could be defended with a claim that lack of funds created staff shortages which resulted in the prison officials' inability to provide the requisite supervision for outdoor exercise.

In conclusion, although the Ninth Circuit is bound by *Wilson*, based on the problems inherent in the deliberate indifference standard and the effect it has had on prisoners' attempts to challenge the conditions of confinement discussed above, it may be a precedent that is worthy of rejection by the individual states.²⁰⁶

The *Wilson* deliberate indifference standard may be appropriate for cases challenging the constitutionality of specific instances of conduct that have never been considered part of the punishment.²⁰⁷ In cases involving specific instances, like the

202. See *Redman*, 942 F.2d 1415 (9th Cir. 1991)(Fernandez, J. dissenting).

203. See *infra* note 176 for a discussion of inadequate funding and deliberate indifference.

204. *Wilson*, 111 S. Ct. at 2325.

205. See Branham, *When Are Prison Conditions Cruel and Unusual?* Preview of the United States Supreme Court Cases 1990-1991 Term. Issue No. 6 (ABA February 1991).

206. However, it should be noted that eighteen states (including California) and Puerto Rico, in an amicus brief, sided with the prison officials' position that a subjective element is required.

207. U.S. Brief at 21.

alleged inadequate medical treatment afforded the prisoner in *Estelle*,²⁰⁸ it may be necessary to require a state-of-mind inquiry. A subjective inquiry may be necessary to qualify such conduct as a constitutional violation since, arguably, mere negligent medical treatment does not amount to a eighth amendment violation. However, because the conditions of confinement are part of the penalty of imprisonment, no subjective inquiry is required to make them qualify for eighth amendment scrutiny. If the conditions are objectively inhumane they violate the protections guaranteed by the eighth amendment. The appropriate standard therefore is the objective standard described in *Rhodes*.²⁰⁹ The *Rhodes* standard properly focused on the objective conditions as experienced by the inmates and whether those conditions result in the "unquestioned and serious deprivations of basic human needs,"²¹⁰ or "deprive inmates of the minimal civilized measures of life's necessities."²¹¹

The states may wish to adopt such a standard that is appropriately focused on the objective inhumanity of the conditions laid out in *Rhodes*²¹² and not on a difficult search for deliberate indifference required by *Wilson*. Under *Wilson*, despite a court's conclusion that a prisoner has been deprived of life's basic necessities, it will not be able to provide a remedy because it will be constrained by the arduous search for deliberate indifference.

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208. 429 U.S. 97 (1976).

209. *Rhodes*, 452 U.S. 337 (1981). The United States noted that *Rhodes* was the first Supreme Court case to specifically deal with the legal standards applicable for general conditions of confinement in the prisons. U.S. Brief at 20. The United States also noted that in *Rhodes* the Court acknowledged that conditions of confinement may compose the punishment. *Id.*

210. *Rhodes*, 452 U.S. at 347.

211. *Id.*

212. *Id.*

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